82-1636

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PATRICK BARNETT, ET UX,
Petitioners

v.

LEONARD FALVEY, ET UX
and
PAUL KIMBLE, ET UX

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Mississippi

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QUESTIONS PRESENTED FOR REVIEW

Were the due process rights of the natural parents of Child X and Child Y violated by Mississippi in denying the natural parents' petition to vacate these adoptions?

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN THE MATTER OF
THE ADOPTION OF CHILD X AND CHILD Y, MINORS

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Mississippi

INTRODUCTORY STATEMENT

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered December 8, 1982, affirming the decision of the Chancery Court of Lincoln County, Mississippi. Copies of both are attached hereto as Appendix B and A, respectively.[1]

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[1] The parties to the proceeding in the Court whose judgment is sought to be reviewed are: Leonard E. and Mona M. Falvey, c/o Ralph Peeples, Esquire, Attorney for Leonard E. and Mona M. Falvey, P. O. Box 553, Brookhaven, MS 39601, and Paul D. and Clara M. Kimble, c/o Charles S. Wright, Esquire, Attorney for Paul and Clara Kimble, Brookway Plaza, Brookhaven, MS 39601.

OPINIONS BELOW

The judgment of the Chancery Court of Lincoln County was entered on November 9, 1981, Appendix A hereto.

The judgment of the Supreme Court of Mississippi was entered on December 8, 1982, and rehearing was denied on January 5, 1983, Appendix B hereto.

FEDERAL QUESTION, HOW AND WHEN RAISED

During the course of the proceedings below in the Chancery Court, the question for review was raised by the very proceedings themselves.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Beginning in the spring of 1980, the natural mother of Child X and Child Y was hospitalized for a series of illnesses. During this time she was in and out of the hospital. Child X resided, periodically, with one set of adopted parents until the natural mother could regain her health. In January of 1981, the natural mother was hospitalized with a severe viral infection. Because of her health, an operation could not be performed. The natural mother was transferred to Mississippi Baptist Hospital in

Jackson at this time but she was discharged January 30, 1981. Approximately one week later, she was advised by her physicians, Dr. Wilkins and Dr. Irby, that there was nothing further they could do medically for her. This was due to the fact that the natural mother had had open heart surgery at the age of ten, and hepatitis at that time. Because of certain comments made by Dr. Irby, the natural mother, and through her the natural father, formed a belief that the natural mother was suffering from a terminal illness. Because of this fear, the natural parents agreed that their two children, Child X and Child Y, should be adopted. They signed consent forms to this effect. The natural father was convinced by the natural mother that this should be done, and both parents were influenced by the fact that they believe the natural mother to be dying.

Upon moving to Zachary, Louisiana in April of 1981, the natural parents found out that, in fact, the natural mother could take care of her children and was not going to die. At that time the natural parents filed a proceeding in the Chancery Court of Lincoln County, to have the adoptions vacated, and the natural children returned to them. Since the right to raise a family, particularly one biologically related to the parents, is a right guaranteed by the due process clause of the Fourteenth Amendment, this proceeding raised a Federal Question.

Upon hearing, the Chancery Court below decided against appellants herein, and allowed the adopted parents to keep Child X and Child Y. This came about by order of the Court dated November 16, 1981. Appeal was taken to the Mississippi Supreme Court, which affirmed the decision of the Chancery Court.

REASON FOR GRANTING THE WRIT

The Mississippi Supreme Court in this case has decided a federal question of substance in a manner which is not in accord with applicable decisions of this Court.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment protects freedom of personal choice in the areas of marriage and family life. *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, 94 S.Ct. 791 (1974); *Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705; *Griswold* v. *Connecticut,* 381 U.S. 479, 85 S.Ct. 1678; *Pierce* v. *Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571; *Prince* v. *Massachusetts,* 321 U.S. 158, 64 S.Ct. 438. This area has been given by the Constitution and the rulings of this Court both procedural (see, for example, *Stanley* v. *Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 1212 (1972) and substantive (see, for example, *Roe* v. *Wade, supra,* at 152-3, 726-7), protection under the law. This is the protection which the natural parents of Child X and Child Y maintain the ruling of the Mississippi Supreme Court has taken away from them.

This Court has always stressed the importance of the family in the American way of life. As pointed out in *Stanley* v. *Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 1212 (1972) this factor of the country's social fiber has been characterized as "essential," "basic civil rights of man," and "rights far more precious . . . than property rights." The importance of this area is most succinctly stated by the Court in *Prince* v. *Massachussetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944) where it was held that

> It is cardinal with us that the custody, care and nuture of the child reside first in the parents, whose primary function and freedom included preparation for obligations the State can neither supply nor hinder . . . And it is in recognition of this that these decisions [of the Court] have respected the private realm of family life which the State cannot enter.

What the Mississippi Court has done here is to deny the natural parents this constitutionally guaranteed protection by upholding an arbitrary and capricious decision of a lower Court sitting as a Court of Equity.

In any type of proceeding which is attempting to comply with the Due Process Clause of the Constitution, this Court has required that a two-fold determination must be made. The exact nature of governmental function must be determined and the private interest that that action by the government affects. The private interst in matters such as this is that of the biological link between parent and child, and the importance of that link in the well being and upbringing of that child. This interest "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley* v. *Illinois, supra,* at 1212; 650-1.

The Appellants herein are not maintaining that there is no governmental function involved in this proceeding. The function is that of providing a smooth and efficient method of providing an adoption mechanism. But, as was so ably pointed out by this Court in *Stanley* v. *Illinois, supra,* at 656; 1215:

> The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process clause in particular, that they were designed to protect the fragile values of a vulnerable citizentry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

This is precisely what occurred in this instance. It was too much trouble, and it would upset the nice, neat proceedings which predated the hearing on this matter too much, for the Court below in Equity and the Mississippi Supreme Court on appeal to protect the natural parents rights to a family. An "overbearing concern for efficiency and efficacy" caused both Courts in this matter to disregard the Constitutionally protected rights of the natural parents.

There was a hearing regarding the natural parents' attempt to have their consent to the adoption proceedings regarding their children revoked or rescinded. But the decision reached by that lower Court, the Chancery Court of Lincoln County, Mississippi, was arrived at in an arbitrary and capricious manner. As appellants pointed out in their brief to the Mississippi Supreme Court, consent was given to these adoptions only after undue influence occurred and they were placed under duress.

Both parents were placed under duress and undue influence by their mistaken belief that the natural mother was suffering from a terminal illness. This erroneous belief led the natural parents to conclude that the natural father, by himself, would be unable to raise and adequately care for two young female children. The line of reasoning behind both the concepts of duress and undue influence is similar. This is that a situation occurs in which particular unusual circumstances present themselves. These circumstances take the form of an "urgency of persuasion" or, more usually, "an improper or wrongful constraint." (*Black's Law Dictionary,* "undue influence," p. 1697) This urgency of persuasion, which in this case was the believed impending death of the natural mother, causes an action to take place within the given situation which normally would not have taken place at all. A person's will is overpowered, and because of that overpowering, the unusual act takes place. The Chancery Court, as a Court of Equity, is to put things back to status quo the duress or undue influence.

It is important to note that these doctrines, and particularly the remedy prescribed for the cure, are not designed to punish the influencer or wrong doer. Rather the idea is to right the wrong involved. Just because a person did not do the influencing is no reason to conclude that no undue influence/duress took place. The overpowering of the will occurred and caused the unnatural act. The overpowering was caused by the mistaken belief of the natural parents that the natural mother was going to die. The harm occurred, and should have been righted.

All of this was brought out in the testimony in the lower Court. The reason that the consent was given to these adoptions—the only reason—was the belief that this action was in the best interest of the children. (Record at 112, attached hereto as Appendix C) Yet the Chancery Court below denied the Appellants' petition to vacate consent and the Mississippi Supreme Court upheld this decision of the Chancery Court. The capricious nature of the decision is evidenced by the Court's ruling (Attached hereto as Appendix D). In that opinion, the Court expounds upon actions of the adoptive parents and the fact that these parties never exerted any pressure or undue influence upon the natural parents. But the Appellants never claimed that these parties were the source of the influence. They only claimed that there was duress and undue influence involved.

The Court below totally ignored this fact. In doing so, it made a mockery of the hearing in this matter. This deprived the natural parents of their Constitutional right to due process of law, which they were entitled to before they were deprived of as precious a right as the right to raise the family that sprung from their loins. The Chancery Court's ignoring of the issues and facts presented in order to reach its decision was so capricious and arbitrary in nature as to deprive the natural parents of any semblance of the type of hearing which the Constitution envisioned. Accordingly, to correct this wrong, this Court must grant this Petition for Writ of Certiorari. To do otherwise would allow a Due Process clause protected right to be trampled upon by decisions of the Chancery Court of Lincoln County and the Supreme Court of the State of Mississippi. The State has entered the "private realm of family life" which this Court in *Prince, supra,* said it was not allowed.

The Appellants realize that there must be an orderly process for adoption of children in order to have any adoption proceedings at all. But they strongly urge upon this Court the position that this case, with its fact situation, is so unique and different in that the normal Mississippi adoption procedure was

not applied to them properly so as to guarantee their Constitutional rights. A granting of certiorari in this matter would not open any floodgates, but would rather serve notice to all Courts of Equity that although they sit alone as fact and law finder, they still must strictly follow the guidelines of the Constitution, and particularly the Fourteenth Amendment guarantee of Due Process under law. As the final Court of Equity in this country this Court must weigh all these factors. After doing so, it is respectfully submitted that the Supreme Court will grant the requested Writ of Certiorari.

CONCLUSION

It is respectfully asserted by the Petitioners herein that the hearing which was had on their Petition to Vacate Consent and the ruling by the Mississippi Supreme Court on appeal therefrom showed such a callous disregard for Appellants' rights under the Due Process clause of the Fourteenth Amendment as to render those rights non-existent in the instant cause. Therefore, certiorari should be granted in this matter and this case reversed, or, in the alternative, reversed and remanded.

Respectfully submitted,

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APPENDIX A

IN THE CHANCERY COURT OF LINCOLN COUNTY, MISSISSIPPI

In The Matter Of The Adoption Of Child X, A Minor
No. 391

and

In The Matter Of The Adoption Of Child Y, A Minor
No. 392

DECREE DISMISSING PETITIONS

The above styled and numbered causes having been consolidated by agreement and coming before this Court on the Petitions of Patrick L. Barnett and wife, Brenda Barnett; Answers as filed by the Respondents Leonard Earl Falvey and wife, Mona Minnette Falvey and also Paul Donald Kimble and wife, Clara Mae Kimble; Motion for Amendment to Petition and Amendment to Petition as filed by Petitioners; Denial of th Amendment to Petition as dictated into the Record by the Respondents; the matter being set for trial by agreement and by a prior order of this Court setting 9:30 a.m. on November 4, 1981, at the Courthouse in Brookhaven, Lincoln County, Mississippi, as the time and place for hearing on the Petition; all parties being present and represented by counsel and announcing ready; the Court having considered all of the evidence as presented in favor of the Petitions and also having considered all of the evidence as presented by the Respondents in support of their Answers and being fully advised in the premises, the Court finds that Petitioners have failed to meet the burden of proof required of them and their Petitions should be dismissed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Petitions in Cause No. 391 and 392, Adoption Docket of Lincoln County, Mississippi, wherein Petitioners seek to vacate Adoption be and same is hereby dismissed with prejudice, same being styled, "Petition to Vacate Adoption", all at the cost of the Petitioners, Patrick L. Barnett and Brenda Barnett.

SO ORDERED, ADJUDGED AND DECREED on this 4th day of November, 1981.

/s/ MIKE CARR
CHANCELLOR

[SEAL]

FILED

Date November 9, 1981

/s/ J. Ronny Smith
Chancery Clerk

APPENDIX B

In the Matter of the ADOPTION OF CHILD X and Child Y, Minors.

No. 53,921.

SUPREME COURT OF MISSISSIPPI.

Dec. 8, 1982.

Reheraing Denied Jan. 5, 1983.

Appeal from Chancery Court, Lincoln County; Mike Carr, Chancellor.

Hugh W. Tedder, Jr., William Sebastian Moore, Jackson, for appellant.

Hobbs, Hobbs & Peeples, Ralph L. Peeples, Charles S. Wright, Brookhaven, for appellee.

Before SUGG, P.J., and ROY NOBLE LEE and DAN M. LEE, JJ.

AFFIRMED.

APPENDIX C

Testimony in Chancery Court

A. Because I knew if I did have a terminal illness, and I thought I did, I wanted the best for my children, because I knew my husband could not take care of them.

Q. Based on that thought, did you approach the Falveys and the Kimbles about adopting your children?

BY MR. PEEPLES: Object to the form of that question.

BY THE COURT: Don't lead the witness.

Q. Did there come a time, Mrs. Barnett, you talked to the Kimbles and the Falveys concerning their adopting your children?

A. Yes.

Q. Without going into all the details, it was decided they would adopt the children, is that correct?

A. Yes, sir.

Q. Brenda, there's no allegation set forth before the court today, and you certainly are not trying in any way to say that either the Kimbles or the Falveys unduly influenced you, are you?

A. No, sir.

Q. And I think Mr. Wright who represents one of the petitioners was the attorney?

A. Yes, sir.

Q. And you are not trying to say he unduly influenced you?

A. No, sir.

Q. And I believe during the adoption proceedings, you talked with the Judge, did you not?

A. Yes, sir.

Q. And you are not trying to say that he unduly influenced you, are you?

A. No, sir.

APPENDIX D

Decision of Chancery Court

BY THE COURT: These matters are before the Court in Adoption Nos. 391 and 392, styled "In the Matter of the Adoption of Child X, a Minor" and "In the Matter of the Adoption of Child Y, a Minor." Insofar as these particular proceedings are concerned and because the Court has kept this matter within the bosom of the Court, so to speak, it's not been made a public matter. The use of names may not create a problem here, but I suggest to counsel, if there's any appeal contemplated, the Supreme Court has spoken very strongly of using fictitious names to represent the names of the parties and of the children. I make no point of that here today, other than to admonish you about using some other form of nomenclature in the event you may decide to do something else after this decision has been rendered.

Now, for about twenty years this Court has been hearing adoption proceedings, and if there is any part of my work that I take seriously, and I do take it all seriously, but the part that I take most seriously is that of an adoption proceeding. I have often marveled at the gratification that a doctor has when he has brought new life into the world and delivered babies and administering to mothers and new-born children, and because, I guess, at one point in my life, I thought maybe I would like to be a doctor, and I may have picked up that inclination along the way, but to me, the adoption practice which I have comes very near filling that gratification in my own life, and I always try to be very careful in adoption proceedings, and I remember this adoption proceeding.

It's been just a very short time ago, and I remember that one of the unusual things about it, first of all, was that the biological parents had joined in the adoption petition in addition to having executed a consent for the adoption of the children, and it was

further brought home to me when they appeared at the hearing which was had, and at that time a full discussion was had by the court with the adopting parents and the biological parents of these two children. Realizing that this was a young family that was giving up two children, I particularly tried to impress upon them the seriousness of what they were doing, and they understood and conversed quite freely with the Court about their situation. Also, the problem of having knowledge of who would have the children and the temptations that would arise in years to come, insofar as seeing the children and trying maybe to dictate something of what they would do with their lives. We discussed that, because that's a very important feature of what we go through when we have adoptions. Not only did the court talk to them, but I talked to the adopting parents and explained to them the problems that may be presented by their knowing the parents of the children and the parents of the children knowing them and knowing where they were, and we all had a very lengthy hearing. And at that time, there was absolutely no semblance of Mrs. Barnett or Patrick Barnett being under any influence of any nature whatsoever. It was their sole and free desire to let their children go and be adopted by these people who have them. Mrs. Barnett did not tell of her impending death or her fear of death, or anything of that nature. Anybody looking at her at that time would have felt that she was just like anybody else who had made up their mind that they were going to place their children for adoption, and that they had executed a consent and had signed a petition and they wanted it done.

Now, I can understand the feeling that these young people have, and they have established themselves now and things seem to be going better for them. A lot better than they were going for them at that time. And I can imagine the frustrations and the feelings they may have now, over knowing their children are somewhere else. But, we must look at what the Court has laid down as guidelines for us in deciding what one can do in a situation like this, and in the *C. C. I.* case, which both counsel have cited, being *C. C. I., et al,* v. *The Natural Parents.* In this case,

the Supreme Court says that the "general law is that the party asserting undue influence has the heavy burden to show that the consent was obtained by undue influence. Such a burden must be met by clear and convincing evidence, and there is no presumption that a party has exercised undue influence upon another. A mere preponderance of evidence on the issue of undue influence is not sufficient."

Now, the burden is on the parents to establish undue influence. Her testimony along is not adequate in this Court's mind, and if other witnesses were to be called, it was her place to call these witnesses and try to meet this heavy burden that the Court has placed upon her. But let's just see what the Court went on to say that might bear upon one's mind. This was a case where there was a young man and a young woman who were not married, and the child was born out of wedlock, and it was placed with an agency, and the agency sought to obtain consents from the mother of the child and, under the more recent Supreme Court decisions, it is now necessary that, if the father be known, that consent be obtained from him, and consent was also sought to be obtained from the father, and ultimately, both parties consented, the young man and the young woman. Then, they married, and after they were married, the realized that they had given up their child, and they wanted their child, and they went back then into court and tried to get their child, and they alleged that they had been unduly influenced into signing these consents. They had been overreached. The Chancellor decided they were right, and he returned the child to them, but the Supreme Court reversed the Chancellor, and it said this about feelings people may have: "There is no doubt that John and Jane were not free from emotions, tensions, and inescapable anxieties which resulted from her pregnancy during the time preceding their marriage. No doubt almost any person situated as they were would experience emotional trauma, but there is no law to the effect that surrender of a child is valid only if done without such distress. If such were the law, almost any child surrender and subsequent adoption decree could be attacked."

Now, I am sure Brenda has been through quite a bit of trauma, after she has realized that they, perhaps could establish a home and raise a child, and there's been a lot of emotion that she's been wrapped up in, but what have the Falveys and the Kimbles done to bring any of this about? They haven't done anything. In the record there is not an iota of any undue influence exerted by them. Now, the court goes on to say, "Not every influence is undue, and undue influence cannot be predicated of any act unless free agency is destroyed, and that influence exerted by means of advice, arguments, persuasions, solicitation, suggestion, or entreaty is not undue, unless it be so importunate and persistent, or otherwise so operate, as to subdue and subordinate the will and take away its free agency. Nor is influence ordinarily considered undue which arises out of sympathy, kindness, attention, attachment, or affection, gratitude for past services, desire of gratifying the wishes of another, or of relieving distress, claims of kindred, and family or other intimate personal relations, love, esteem, social relations, prejudices or flattery. ....The ultimate fact for determination is whether the complaining party was deprived of free exercise of his own will. The conduct of the dominant party must have been such as to override the volition of the victim."

So, I am compelled to hold that there has been nothing here which would override the will of either of these parties. That they had a freedom to exercise whatever rights they wanted to exercise, and they executed this consent. They signed these petitions. They appeared before this Court and gave testimony in support of the petitions to adopt, and the interlocutory period which the Court provided was for the benefit of the Court in enabling it to see how these children would adjust in the homes of these people. An interlocutory period is not a period afforded to persons who have signed consents to decide whether they want to permit the adoption to proceed during that period of time or not. They could have brought this action, regardless of whether or not I had made this adoption final. If they had been

over-reached, if they had not freely and voluntarily executed this consent, if there had been undue influence exerted upon them in any way, then even if the adoption had been made final by this Court, they could have come in and asked to revoke or vacate their consent within the time prescribed by statute. So, the interlocutory period is for the benefit of the court, to enable it to determine if the placement and the adoption it's asked to make is good; if the home is a good home, if the children are going to adjust well. And ultimately, the Court will be faced with a petition to finalize this interlocutory decree. But, as much as I feel, Pat, for you and Brenda, as much as I know that you are disappointed by what you have done; neverthless, the law has been, I think, very fairly put, when it's put as the Supreme Court has put it, and I see no way in this world for me to go back on what you have done. So, my finding is that the consents were executed freely and voluntarily and by the free exercise of the free will of these persons. That the respondents, the Kimbles and the Falveys, have done nothing whatsoever to create any undue influence or any duress, and that the situation of Mrs. Barnett's illness which, no doubt, bore heavily upon her mind, was an emotional thing which she evidently satisfied at some time or other before she came to the hearing, because no point was made of there being any problem with that at that time, and she is an intelligent person, and her husband is a good husband, I am sure. I don't think that she has influenced him to the extent that he would do anything other than what he would want to do. I think he's capable of being his own man, and I know Pat well enough to know that he can be his own man, and that he was not under any kind of duress or undue influence at that time, and so I'm going to deny the petitions to vacate the consents and tax the costs against the petitioners.

(COURT ADJOURNED)